IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-705

BROWNING-FERRIS INDUSTRIES, INC.,
Petitioner,

v.

TIGER TRASH, A Division of JOE W. MORGAN, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, Browning-Ferris Industries, Inc. ("BFI"), respectfully petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision entered by that Court in Cause No. 76-2259 on August 18, 1977.

OPINIONS BELOW

The decision of the Seventh Circuit is officially reported at 560 F.2d 818 (7th Cir. 1977), is unofficially reported at 1977-1 Trade Cas. ¶ 61,585 (7th Cir. 1977) and is Appendix A at page 19 of this petition.[1] The Seventh Circuit re-

[1] References to the Appendices attached hereto will be made by "App." followed by the page number.

versed the decision entered in favor of BFI by the United States District Court for the Southern District of Indiana, Evansville Division, Judge James E. Noland presiding, in Cause No. EV 75-91-C. The decision of the District Court, which consisted of a memorandum entry and order of dismissal, is not officially reported, but it is unofficially reported at 1976-2 Trade Cas. ¶ 61,141 (S.D. Ind. 1976) and is Appendix B at page 31 of this petition.

JURISDICTION

The judgment of the Seventh Circuit was made and entered on August 18, 1977. It reversed the decision entered by the District Court in favor of the petitioner, BFI, and against the respondent, Tiger Trash, dismissing Tiger Trash's antitrust claims on the ground that BFI is not subject to venue and personal jurisdiction in the Southern District of Indiana.[2] The Seventh Circuit's mandate was initially stayed for thirty days to permit the filing of this petition, but the Seventh Circuit subsequently denied BFI's motion for a further extension of the stay, and the Court's mandate was therefore issued on October 17, 1977.

This petition for certiorari was filed within ninety (90) days after the entry of the Seventh Circuit's judgment on August 18, 1977, and this Court has jurisdiction to review the Seventh Circuit's decision pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

The basic issue being presented to this Court concerns the application of the antitrust venue provision of Section

[2] The Seventh Circuit also reversed the District Court's order of summary judgment in favor of BFI's subsidiary and co-defendant, Browning-Ferris Industries of Indiana, Inc. ("BFI-Indiana"), which the District Court had entered on the ground that it lacked subject-matter jurisdiction over Tiger Trash's antitrust claims against BFI-Indiana. That part of the Seventh Circuit's decision is not being submitted for review by this Court, and BFI-Indiana has no interest in and is not a party to this petition.

12 of the Clayton Act (15 U.S.C. § 22) to a national holding corporation (BFI) which does not itself transact business in the forum district, but which owns an operating subsidiary corporation (BFI-Indiana) that does transact business in the forum district. Specifically, the question being presented for review is as follows:

Whether a national holding or parent corporation is subject to venue and jurisdiction under Section 12 of the Clayton Act (15 U.S.C. § 22) in a district in which its wholly-owned subsidiary transacts business, when the parent itself transacts no business there, when the parent and its subsidiary are separate corporations, and when the parent exercises no control over the subsidiary sufficient to make the subsidiary its agent or *alter ego*.

STATUTE INVOLVED

The only statute involved in this case is the federal antitrust venue provision in Section 12 of the Clayton Act (15 U.S.C. § 22), which provides:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

STATEMENT OF THE CASE

The petitioner, BFI, is a national holding corporation which owns subsidiary corporations engaged in the waste removal business in several states. BFI is incorporated under the laws of Delaware, and it has its office and principal place of business in Houston, Texas. One of its subsidiaries, BFI-Indiana, is an Indiana corporation which owns and operates a local waste removal business in the general geographic area centered around Evansville, Indiana. The respondent, Tiger Trash, also operates a waste

removal business in that area and is a competitor of BFI-Indiana.

On July 14, 1975, Tiger Trash initiated this antitrust action in the District Court for the Southern District of Indiana, Evansville Division. Tiger Trash named BFI-Indiana as a defendant. But not being content with suing its actual operating competitor, Tiger Trash also named BFI as a defendant and had process served on BFI at its office in Houston, Texas, pursuant to the extraterritorial service of process provision in Section 12 of the Clayton Act. Tiger Trash's original complaint alleged that BFI-Indiana and BFI were attempting to monopolize the local waste removal market in Evansville, Indiana, and Henderson, Kentucky, in violation of Section 2 of the Sherman Act (15 U.S.C. § 2). Tiger Trash subsequently amended its complaint to add an identical claim based on the similar Indiana antitrust statute (Ind. Code 24-1-2-2) and a claim against BFI based on Section 7 of the Clayton Act (15 U.S.C. § 18). The jurisdiction of the District Court over Tiger Trash's federal antitrust claims was based on 28 U.S.C. § 1337, and jurisdiction over its state antitrust claim was based on pendent jurisdiction because diversity of citizenship was absent.

Since BFI's contact with the State of Indiana is its ownership of BFI-Indiana, BFI filed a motion to dismiss Tiger Trash's claims on the ground that BFI is not subject to personal jurisdiction in Indiana either under Section 12 of the Clayton Act or under the Indiana long-arm rule [Ind. Rules of Trial Procedure, Trial Rule 4.4(A)]. In support of that motion, BFI submitted an uncontroverted affidavit showing that BFI—being a non-operating parent company—does not do or solicit business in Indiana, has no property or office of any kind in Indiana, has no employees or agents in Indiana, has never supplied services of any kind or goods or materials of any kind in Indiana,

and has never manufactured or sold goods or materials which were shipped into Indiana.

Tiger Trash then sought to meet its burden of proving jurisdiction over BFI by relying solely on the relationship between BFI and its Indiana operating subsidiary, BFI-Indiana. That is, Tiger Trash's position was that BFI *constructively* transacts business in Indiana through its subsidiary as a result of the purported "control" which BFI exercises over its subsidiary. The evidence submitted by Tiger Trash consisted mainly of BFI's annual report and SEC Form 10K, which described the general policies set by BFI to guide its subsidiaries and the various inter-organizational services provided by BFI to its subsidiaries. In addition, Tiger Trash submitted evidence of advertising and correspondence *by the subsidiary* in which it used the "Browning-Ferris" logo, as well as evidence of the execution of one customer service agreement by a former Regional Sales Manager of BFI on behalf of BFI-Indiana.

In order to demonstrate that the corporate separateness between BFI and BFI-Indiana is maintained and that BFI-Indiana is not the agent or *alter ego* of BFI, BFI submitted the affidavit of the Vice President and general manager *of the subsidiary*. It showed that the subsidiary does operate its own business and makes all major policy decisions which are characteristic of an autonomous operation. The subsidiary decides for itself—all independently of and without the approval of BFI—the nature of the particular waste removal services in which it will engage, the prices to be charged for its services, the geographical area in which it will operate, and the customers whom it will solicit. Moreover, the subsidiary maintains its own books and records, owns all of its assets, does its own local advertising, recruits and pays its employees from its own payroll, and plans, constructs and pays for the capital improvements to its facilities. Of the six officers of the subsidiary, only two concurrently hold positions with BFI.

The actual management and operation of the day-to-day business of the subsidiary is the responsibility of the Vice President and general manager, who does not hold any position with BFI. Finally, and very importantly, the subsidiary is not authorized to act as an agent for BFI in any capacity.

In short, the undisputed evidence showed that the waste removal business being transacted in Indiana is in fact transacted by the subsidiary, not by BFI, although BFI obviously maintains some general control over the subsidiary due to the fact that BFI is the sole owner of the subsidiary. Accordingly, the District Court granted BFI's motion to dismiss, holding that BFI does not "transact business" in Indiana within the meaning of Section 12 of the Clayton Act and also that BFI was not subject to jurisdiction under the Indiana long-arm rule. (App. 32-37.)[3] In reaching that result, the District Court applied the standards established by Courts of Appeals in other Circuits to the effect that a parent corporation is not subject to venue and jurisdiction in a district in which a subsidiary corporation transacts business, unless the parent actually controls and manages the daily business affairs of the subsidiary, and the parent and subsidiary in effect act as a single corporate entity. (App. 34.) *San Antonio Telephone Co. v. American Telephone & Telegraph Co.*, 499 F.2d 349 (5th Cir. 1974); *O.S.C. Corporation v. Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974); *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358 (10th Cir. 1974). Thus, although the District Court observed that there does "appear to be more than a casual relationship" between BFI and its subsidiary due to the interorganizational activity between the

[3] As noted by the Seventh Circuit, Tiger Trash did not appeal the ruling that BFI is not subject to jurisdiction under the Indiana long-arm rule. (App. 21, n. 2.) Therefore, the only issue on appeal was the amenability of BFI to venue and jurisdiction under Section 12 of the Clayton Act.

two corporations and the services provided by BFI to its subsidiary (App. 33), the District Court held that the subsidiary "is not the agent or *alter ego* of BFI," and that while "some degree of control inherently results from the nature of the corporate structures, the Court believes that the two corporations function separately from each other and must be treated as such in this lawsuit." (App. 35.)

The Seventh Circuit reversed that decision, and in doing so, it utterly ignored the venue standards applied by Courts of Appeals in other Circuits. Instead of applying the common standard of "agent or *alter ego*," the Seventh Circuit devised the amorphous standard "sufficient control," stating the issue to be whether "BFI exercised *sufficient control* over its Indiana subsidiary to cause the parent to 'transact business' in Indiana within the special venue provision of the Clayton Act." (App. 22, emphasis added.) The Court then proceeds to a discussion of certain facts, but it expressly declines to discuss the facts presented by BFI which negate an "agent or *alter ego*" relationship. (App. 25.) Instead, the Court limits its consideration to the evidence presented by Tiger Trash, the vast majority of which consists merely of general statements extracted from BFI's annual report and Form 10K describing the general policies set by BFI for its subsidiaries and the services provided by BFI to its subsidiaries. (App. 23.) Finally, the Seventh Circuit makes the simplistic conclusion that the "record establishes that there is *enough* control and direction from parent to subsidiary to make the parent amenable to suit in the Southern District of Indiana." (App. 24, emphasis added.)

The Seventh Circuit, thus, substituted the indeterminate and wholly subjective formula of "sufficient control" for the established standard used by other Circuits, i.e., such control that makes the subsidiary the agent or *alter ego* of the parent. The Seventh Circuit did not and could not have made the standard findings of agency or *alter ego*,

i.e., that the corporate separateness between BFI and its subsidiary was disregarded or that BFI controlled and managed the daily business affairs of its subsidiary.

Moreover, the Seventh Circuit's opinion has implications far beyond the particular parent-subsidiary relationship revealed on the record here. The opinion subjects every national holding company to federal antitrust jurisdiction wherever its operating subsidiaries do business. Since the Seventh Circuit found "sufficient control" in BFI's setting general policy objectives for its subsidiaries and in BFI's providing certain financial services to its subsidiaries, the Seventh Circuit's decision is equally applicable to the relationship between most national holding companies and their subsidiaries. The effect of the Seventh Circuit's decision would be to subject national holding companies to venue and jurisdiction in *each and every* district in which the parent corporation owns an operating subsidiary, even though the parent does not itself transact business in any such district, and even though no operating subsidiary is the *alter ego* or "agent" of the parent.

REASONS FOR GRANTING THE WRIT

This case presents the issue of whether Section 12 of the Clayton Act is intended and should be construed to extend venue over a national holding company which does not transact business in the forum district, but which has an operating subsidiary which does transact business there. That issue requires a resolution by this Court, for two reasons.

First, the decision of the Seventh Circuit in this case directly conflicts with decisions by Courts of Appeals in other Circuits. Unless that conflict is resolved, the amenability of a national holding company to venue *and jurisdiction* in antitrust suits in foreign districts will depend on the Circuit in which the suit is brought.[4]

Second, the issue concerns an important question of federal venue law which has not been, but should be, settled by this Court. The federal venue statute involved is exclusively applicable to federal antitrust cases and should be applied uniformly by the federal courts. The statute is being applied inconsistently, however, because this Court has never directly settled the issue presented, and prior decisions by this Court in related contexts are not being applied consistently when carried over to the venue provisions of Section 12 of the Clayton Act.

Furthermore, the jurisdictional issue presented should be resolved by this Court now, even though this case has been remanded to the District Court. Otherwise, BFI will be subjected to litigating a protracted antitrust case even though this Court would conclude that the District Court has no jurisdiction over BFI.

1. The Decision Of The Seventh Circuit Conflicts With The Decisions Of Other Courts of Appeals In The Application Of Section 12 Of The Clayton Act.

In determining whether a parent corporation is subject to venue and jurisdiction under Section 12 of the Clayton Act in a district in which a subsidiary corporation transacts business, Courts of Appeals other than the Seventh Circuit have applied standards recognizing and upholding the legitimately created separate corporate identities of the two corporations. Although the standards are often stated in different terms, the basic standard applied is that the

[4] Although Section 12 of the Clayton Act is basically a venue statute, it also operates as a "long-arm" statute for jurisdictional purposes due to the provision allowing service of process beyond the boundaries of the forum district. Thus, if venue is proper, a plaintiff can obtain jurisdiction over a corporate defendant in a distant forum by the simple expedient of having process served at the defendant's home office, wherever that may be.

parent is not subject to venue and jurisdiction in a subsidiary's district unless there is a *total disregard of the corporate entities*, or unless—synonymously—the parent controls the *daily business affairs* of the subsidiary to the extent that the subsidiary is nothing but *the agent or alter ego* of the parent. Thus, in *San Antonio Telephone Co., Inc. v. American Telephone & Telegraph Co.*, 499 F.2d 349 (5th Cir. 1974), the Fifth Circuit held that associated operating companies of AT & T were not subject to venue under Section 12 of the Clayton Act in a district where venue was proper as to AT & T, saying:

> "• • • While it is true that venue may be established through a relationship between corporations when they in effect comprise a single entity, Fisher Baking Co. v. Continental Baking Corp., 238 F.Supp. 322 (D.Utah, 1965), the evidence in this case does not demonstrate such a *total disregard for the separate corporate entities.* Rather it appears that, while AT & T may dictate *general* policies of the operating companies, *the daily business affairs* are the responsibility of the different companies. *See* O. S. C. Corp. v. Toshiba America, Inc., 491 F.2d 1064 (9th Cir., 1974)." (Emphasis added.) 499 F.2d at 352.

That holding was recently reaffirmed by the Fifth Circuit in *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426 (5th Cir. 1977), where the Court held that the Professional Golfers' Association of America (PGA) was not subject to venue in an antitrust case on the basis of the contacts of its Tournament Players Division with the forum district, because the District Court did not find "a 'total disregard for the separate corporate entities' • • •." 555 F.2d at 437.

Similarly, in *O.S.C. Corporation v. Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974), the Ninth Circuit held that a foreign parent corporation of a wholly-owned subsidiary transacting business in the forum district is not subject

to venue and service of process under Section 12 of the Clayton Act, when the two corporations are "separate entities" and the parent has not "in fact controlled *and managed* the subsidiary." 491 F.2d 1066, 1067. (Emphasis added.) In *Aro Manufacturing Co. v. Automobile Body Research Corporation*, 352 F.2d 400 (1st Cir. 1965), *cert. denied*, 383 U.S. 947 (1966), the First Circuit likewise declined to subject a parent corporation to service of process under Section 12, because its local subsidiary was not a "dummy" of the parent. 352 F.2d at 404.

All of these decisions apply standards recognizing the legitimacy of creating separate corporate subsidiaries to operate local businesses, and they do not permit piercing of the corporate veil unless the parent's control over the subsidiary is great enough to result in the two corporations being in effect one entity. These standards derived from this Court's early decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), which was not an antitrust case but did involve the issue of personal jurisdiction over a foreign parent corporation. In that case, this Court held that a foreign parent corporation was not "doing business" in a state on the basis of its ownership of a subsidiary which marketed the parent's products in the state. The Court stated:

> "• • • Through ownership of the entire capital stock and otherwise, the defendant dominates the Alabama corporation, immediately and completely, and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the Cudahy products in other states. *The existence of the Alabama company as a distinct corporate entity is, however, in all respects observed.* Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the

same way as if the two were wholly independent corporations. * * *

"* * *

"The defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the state in its corporate capacity. It might have conducted such business through an independent agency without subjecting itself to the jurisdiction. Bank of America v. Whitney Central National Bank, 261 U. S. 171, 43 S. Ct. 311, 67 L.Ed. 594. It preferred to employ a subsidiary corporation. *Congress has not provided that a corporation of one state shall be amenable to suit in the federal court for another state in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein.* * * *"
(Emphasis added.) 267 U.S. at 335-336.

That decision was expressly relied on by the First and Ninth Circuits in *Aro Manufacturing Co.* and *O.S.C. Corporation*, respectively, and it was implicitly relied on by the Fifth Circuit in *San Antonio Telephone Co., Inc.*, because the Court there relied on *O.S.C. Corporation.*

In this case, however, the Seventh Circuit did not apply the standards enunciated in *Cannon*, nor—more importantly—did it apply the similar standards which other Courts of Appeals have specifically applied to venue under Section 12 of the Clayton Act. Instead, the Seventh Circuit adopts an amorphous standard which would have the effect of subjecting most national parent companies to venue and jurisdiction in each district in which a subsidiary transacts business. The Seventh Circuit begins by stating that the issue is simply whether BFI exercises "sufficient" control over its subsidiary (App. 22), and it concludes by stating that BFI does exercise "enough" control and direction (App. 24). The Court relies principally on factors relating to the general policies set by BFI for its subsidiaries and the interorganizational services provided by BFI to its subsidiaries (App. 23.) The Court never defines what "sufficient" control is, and it does not even discuss the facts presented by BFI to show the independence of its subsidiary, particularly the undisputed facts that the subsidiary determines for itself the services it will provide, the geographical area in which it will operate, the customers whom it will solicit, and the prices which it will charge. Thus, the Court did *not* find that there is a total disregard of the corporate entities or that the subsidiary is controlled to the extent that it is the *alter ego* of BFI. If the Court had considered all of the facts and had applied the same standards set by other Courts of Appeals, it would have reached the same conclusion as the District Court, i.e., that the two corporations function as two separate corporations and the subsidiary is not merely the agent or *alter ego* of BFI. (App. 35.)

Moreover, the factors principally relied on by the Seventh Circuit, namely, the setting of general policies and the providing of services by BFI, would be common to the relationship between most national parent companies and their subsidiaries.[5] Thus, by stressing those factors and using an undefined standard based on "sufficient" control, the Seventh Circuit has adopted a new standard which would subject most national parent companies to venue and jurisdiction in *every* district in which a subsidiary transacts business.

Therefore, the decision of the Seventh Circuit in this case creates an inherent conflict with decisions of other Courts of Appeals in determining the standards to govern the application of Section 12 of the Clayton Act to national parent corporations which do not themselves transact business in a forum district, but which own a subsidiary that does. The resolution of that conflict by this Court is im-

[5] Those factors were all derived from general statements appearing in BFI's annual report and SEC Form 10K, which described the general policies set by BFI and the services it provides to all of its subsidiaries.

portant, because a uniform application of Section 12 of the Clayton Act is imperative. That statute is the principal venue statute in federal antitrust suits against corporations, and it also is the principal means used to obtain long-arm jurisdiction over foreign corporations in antitrust cases. As matters now stand, though, the amenability of a national parent holding company to venue and jurisdiction under Section 12 in an operating subsidiary's district will depend on the Circuit in which the antitrust suit is brought.

2. The Issue Presented Concerns An Important Question Of Federal Antitrust Venue Law Which Has Not Been, But Should Be, Resolved By This Court.

This Court should accept review of this case because the question presented involves an important issue of federal antitrust venue law which has not been, but should be, resolved by this Court. The answer to the question presented is currently unsettled in the federal courts, primarily because this Court declined to decide the issue on at least one prior occasion. The result has been that prior decisions by this Court in related contexts are not being applied consistently when carried over to Section 12 of the Clayton Act.

As discussed previously, Courts of Appeals other than the Seventh Circuit have held that a parent holding corporation is not subject to venue and jurisdiction under Section 12 of the Clayton Act in a district in which an operating subsidiary transacts business, unless there is a total disregard of the corporate entities or unless the subsidiary is the agent or *alter ego* of the parent. *San Antonio Telephone Co., Inc. v. American Telephone & Telegraph Co.*, 499 F.2d 349 (5th Cir. 1974); *O.S.C. Corporation v. Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974); *Aro Manufacturing Co. v. Automobile Body Research Corporation*, 352 F.2d 400 (1st Cir. 1965), *cert. denied*, 383 U.S. 947 (1966). The standards applied by those Courts recognize and give effect

to the corporate separateness of the two corporate entities. The standards were derived from this Court's long-standing decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), a non-antitrust case in which this Court held that a foreign parent corporation is not subject to personal jurisdiction in a state where its subsidiary does business, if the existence of the subsidiary as a distinct corporate entity is observed.

Subsequent to the decision in *Cannon*, this Court decided the case of *United States v. Scophony Corporation of America*, 333 U.S. 795 (1948), which, at the present time, is considered the leading case on the interpretation of the venue provision of Section 12 of the Clayton Act. In *Scophony*, this Court held that a British corporation was itself transacting business in the forum district under Section 12, because it had created an American subsidiary for the purpose of promoting its patents and inventions in the United States, it had executed "master" agreements for continuing control of, and intervention in, the business conducted in the United States, and its authorized agents were present and acted on its behalf in the forum district. The defendant attempted to argue that the case was governed by the principles established in cases such as *Cannon*, claiming that it was merely protecting its investment in its American subsidiary. 333 U.S. at 812-813, n. 23. The Court held that the facts did not support such an argument, and the Court therefore declined to decide whether the rationale of *Cannon* is applicable to establishing venue in antitrust cases under Section 12. The Court concluded on that issue, "For present purposes those decisions [*e.g., Cannon*] may be left untouched for the facts and situations in which they have arisen and to which they have been applied." 333 U.S. at 817.

Since the Court did leave *Cannon* "untouched," Courts of Appeals other than the Seventh Circuit, as noted above, have applied the principles of *Cannon* in determining venue

and jurisdiction over parent corporations under Section 12. *San Antonio Telephone Co., Inc., supra; O.S.C. Corporation, supra; Aro Manufacturing Co., supra.* In addition, several Courts of Appeals have held in non-antitrust cases that the principles of *Cannon* have survived both the decision in *Scophony* and this Court's leading jurisdictional decision in *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945), in determining personal jurisdiction over parent corporations. *Berkman v. Ann Lewis Shops,* 246 F.2d 44, 50 (2d Cir. 1957); *LeVecke v. Griesedieck Western Brewery Co.,* 233 F.2d 772, 776 (9th Cir. 1956); *Steinway v. Majestic Amusement Co.,* 179 F.2d 681, 683-84 (10th Cir. 1949), *cert. denied,* 339 U.S. 947 (1950); *Echeverry v. Kellogg Switchboard & Supply Co.,* 175 F.2d 900, 903-04 (2d Cir. 1949). As stated by the Tenth Circuit in *Steinway,* neither *Scophony* nor *International Shoe* "warrant disregard of corporate entities, so as to treat the acts of the resident corporation as those of the nonresident stockholder corporation." 179 F.2d at 684.

On the other hand, some federal District Courts have held that *Scophony* in effect overruled *Cannon* and that the principles of *Cannon* do *not* govern venue and jurisdiction in antitrust cases under Section 12 of the Clayton Act. *Grappone, Inc. v. Subaru of America, Inc.,* 403 F.Supp. 123, 130-31 (D. N.H. 1975); *Call Carl, Inc. v. BP Oil Corporation,* 391 F.Supp. 367, 372-73 (D. Md. 1975); *Flank Oil Co. v. Continental Oil Co.,* 277 F.Supp. 357, 364-65 (D. Colo. 1967). Those cases were cited and relied on by the Seventh Circuit in this case (App. 25), which means the Seventh Circuit has implicitly rejected *Cannon* as having any continuing viability in antitrust cases. In its place, the Seventh Circuit has substituted its new, virtually undefined standard based on whether the parent exercises a "sufficient" level of control over the local subsidiary. That standard would subject most national parent companies to suit in every district in which a subsidiary transacts business, particularly in light of the Seventh Circuit's broad generalization that "BFI's construction of Section 12 of the Clayton Act would enable large American corporations like itself to circumvent the antitrust laws by incorporating the many functional subparts of the parent into local operations." (App. 26.) However, if the separate incorporation of local operations is to be condemned in the name of promoting a particular type of federal litigation, the remedy should come from Congress, not the courts. Paraphrasing *Cannon,* "Congress has not provided that a corporation of one state shall be amenable to [an antitrust] suit in the federal court for another state in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein." 267 U.S. at 336.

In any event, the important fact is that the federal courts' application of the *Cannon* ruling to venue and jurisdiction under Section 12 of the Clayton Act is in a totally unsettled state. Most Courts of Appeals continue to recognize the validity of incorporating separate subsidiaries to carry on local businesses, and they do not subject the parent corporation to antitrust suits in distant forums unless the corporate separateness is not maintained. The Seventh Circuit and some District Courts, in reliance on *Scophony,* have rejected the continuing viability of *Cannon,* despite the fact that this Court in *Scophony* specifically left *Cannon* and similar cases untouched. Therefore, the *only* means of settling the question presented is for this Court to accept review of this case. A definitive decision by this Court is important not merely because of the conflict in Circuits, but also because of the need for basic uniformity in the application of a federal venue statute governing suits on a federal cause of action. The amenability of a national parent holding corporation to an antitrust suit in an operating subsidiary's district should not turn on the location of the Circuit in which the suit is brought.

CONCLUSION

Due to the importance of this case to the uniform application of Section 12 of the Clayton Act, as well as the need for this Court to resolve a conflict among the Circuits and an unsettled question of federal antitrust venue law, a writ of certiorari should issue to review the decision of the Seventh Circuit in this case.

Respectfully submitted,

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Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-2259

TIGER TRASH, A Division of JOE W. MORGAN, INC.,
Plaintiff-Appellant,

v.

BROWNING-FERRIS INDUSTRIES, INC., BROWNING-FERRIS INDUSTRIES OF INDIANA, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
No. EV 75-91-C — **James E. Noland**, Judge.

HEARD JUNE 2, 1977 — DECIDED AUGUST 18, 1977

Before CUMMINGS, SPRECHER and TONE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In the first two counts of its amended complaint filed on February 20, 1976, plaintiff, which is engaged in the solid refuse collection service business in Evansville, Indiana, and Henderson, Kentucky, alleges that defendant, Browning-Ferris Industries of Indiana, Inc. (BFI Indiana) of Evansville, Indiana, and its parent corporation, Browning-Ferris Industries, Inc. (BFI) of Houston, Texas, engaged in an attempt to monopolize the Evansville-Henderson market by using certain restraints on competition in violation of Section 2 of the Sherman Act (15 U.S.C. § 2). The third count alleges a violation of similar provisions of the Indiana Antitrust Act (Ind. Ann. Stat. §§ 24-1-2-2 and 24-1-2-7). BFI, a Delaware corporation with its principal place of business in Houston, Texas, is engaged in the business of solid waste collection, processing, recovery and disposal. BFI, a parent

holding company, operates through a large number of wholly owned subsidiaries, one of which is BFI Indiana. The fourth count of the complaint, which charges only BFI, alleges a violation of Section 7 of the Clayton Act (15 U.S.C. § 18). Like plaintiff, BFI Indiana collects and disposes solid waste refuse for industry, commercial establishments, restaurants, and apartments in Evansville, Indiana, and Henderson, Kentucky. Jurisdiction was based on 28 U.S.C. § 1337.

On October 30, 1975, BFI filed a motion to dismiss or to quash the return of service of summons upon it in Houston, Texas resulting from the July 14, 1975 filing of plaintiff's original complaint, on the ground that the district court lacked personal jurisdiction over BFI because it "is not an inhabitant of, cannot be found in, and does not transact business in the State of Indiana" and therefore is not subject to suit in the Southern District of Indiana under Section 12 of the Clayton Act (15 U.S.C. § 22).[1] BFI also asserted in the same motion that it was not subject to the pendent Indiana "long-arm" personal jurisdiction of the district court below under the Indiana Antitrust Act because it "does not do business in the State of Indiana and has not supplied or contracted to supply services of any kind or goods or material of any kind in the State of Indiana * * *.". The motion was accompanied by a supporting affidavit of BFI vice president Stephen L. Thomas.

Also on October 30, 1975, BFI Indiana answered the original one-count complaint based on Section 2 of the Sherman Act. In addition to denying the material allegations of the complaint, BFI Indiana counterclaimed against plaintiff on a Section 2 theory, and in two pendent counts based on Ind. Ann. Stat. § 24-1-2-2 and a separate claim for tortious interference with its customers. Plaintiff filed its answer to BFI Indiana's counterclaims on December 4, 1975. BFI Indiana answered the amended complaint on

[1] Section 12 of the Clayton Act provides:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

March 15, 1976 and additional and amended counterclaims were tendered on May 12, 1976. BFI Indiana filed a motion on February 25, 1976, for a summary judgment dismissing the first three counts of the amended complaint on the ground that plaintiff did not properly define the relevant service market or on the alternate ground that "there is no dangerous probability that the alleged attempt to monopolize could be successful * * *." An additional ground for the motion as to Counts I and II was that "Any alleged attempt to monopolize trade would not have an appreciable effect on interstate commerce * * *." The motion was accompanied by a supporting affidavit of Harold Post, vice-president of BFI Indiana.

After further affidavits were filed and certain limited discovery took place, the district court granted BFI's motion to dismiss it from the lawsuit for lack of personal jurisdiction, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. Simultaneously, summary judgment was granted to BFI Indiana. This October 12, 1976, order of the court was accompanied by an unreported memorandum opinion. In his opinion, Judge Noland held BFI did not transact business within the Southern District of Indiana and therefore was not amenable to suit under Section 12 of the Clayton Act.[2] With respect to the summary judgment motion of BFI Indiana, the district court refused to hold that it does not have the potential to acquire monopolistic control in the Evansville-Henderson market area because too many factual questions were still present. However, summary judgment was accorded to BFI Indiana as to both Sherman Act counts on the ground that its activities do not have an appreciable effect on interstate commerce. Pendent Count III was dismissed because of the dismissal of the two federal counts.

[2] The district court also ruled that plaintiff could not acquire jurisdiction over the federal or state claims against BFI by means of the Indiana long-arm statute (Trial Rule 4.4(A) of the Indiana Rules of Procedure). This ruling is not challenged on appeal. The district court's dismissal is limited to personal jurisdiction in the venue rather than the due process sense. No constitutional objections to *in personam* jurisdiction over BFI are asserted, assuming venue to be proper, and we perceive none. *McBreen* v. *Beech Aircraft Corp.*, 543 F.2d 26 (7th Cir. 1976); see *United States* v. *Scophony Corp.*, 333 U.S. 795, 803-804 and n.13.

Five and one-half months before handing down the aforesaid opinion, a district court magistrate had stayed the requirement of any response by BFI to certain interrogatories filed by plaintiff and stayed all discovery against BFI Indiana until the court could rule on the defendants' respective motions to dismiss and for summary judgment. The appeal challenges these discovery rulings as well as the order granting BFI's motion to dismiss and BFI Indiana's motion for summary judgment. We reverse and remand.

Venue of Suit Against BFI

Under Section 12 of the Clayton Act, BFI, the parent corporation, would be amenable to suit in the Southern District of Indiana if it transacts business there. See note 1 *supra*. Service of process upon BFI at its home office in Houston, Texas, was of course proper under Section 12 because it permits service "in the district of which it [an antitrust defendant corporation] is an inhabitant, or wherever it may be found."

Plaintiff correctly asserts that the issue under Section 12 of the Clayton Act is whether BFI exercised sufficient control over its Indiana subsidiary to cause the parent to "transact business" in Indiana within the special venue provision of the Clayton Act. Plaintiff first contends that the district court should have considered the presence in Indiana of "an officer of BFI's Waste Systems Division who was participating in the day to day type of sales program with customers and signing [a number of] contracts [in Indiana] on behalf of BFI Indiana" (Br. 20). BFI's answer to plaintiff's request for admission admitted that one Gerd Henson, who was not an employee of BFI Indiana, had been a Regional Sales Manager "in the Waste Systems Division" and had entered Indiana in July 1975 to solicit sales and service agreements for BFI Indiana, and defendants' brief concedes that Henson was a regional sales manager of BFI (Br. 8, 25, 26). Although only one BFI service agreement executed by Henson in Indiana was attached to plaintiff's request for admissions, paragraph 9 of defendants' response admits that he solicited other sales and service agreements for BFI Indiana.

This is of course an indication of a control relationship between parent and subsidiary.

In its memorandum opinion, the district court concluded that there was "more than a casual relationship between BFI and BFI Ind[iana]" (Mem. op. 3). To support this conclusion, the court found:

> "Certain of the officers of BFI-Ind. are also officers of BFI. Consolidated financial statements and tax returns are filed by BFI and its subsidiaries. The parent initiates management training and development programs for its subsidiaries, although BFI-Ind. asserts that it does not utilize the program. Division Regional officers of BFI assist in the activities of the subsidiaries in their respective local regions. National marketing programs are carried on by BFI to enhance the promotional efforts of their local operations. To this end, it appears that neither BFI nor BFI-Ind. make a determined effort to notify the public that they are separate entities. That is to say, both BFI and BFI-Ind. conduct their advertising and promotional activities in such a manner so as to give the appearance of one company operating nationwide to provide waste removal services. Also, additional services, such as the lending of money for capital improvements, are also provided by BFI to its subsidiaries." (*Idem*)

Development of the ability to provide a single source of reliable waste services for companies with a number of geographically dispersed plants is an integral part of BFI's corporate policy. BFI officers, some of whom are officers of BFI Indiana, assist the subsidiary through national marketing programs, signing up customers, making basic market development decisions and assisting in supervising the subsidiary by allocating financial resources, providing finances, systems accounting, management supervision and examination and setting standards for return on capital investment from the subsidiary. If a subsidiary's rate of return does not meet BFI standards, BFI imposes corrective action. Also, BFI Indiana licenses and utilizes the parent's trade names without complying with Ind. Ann.

Stat. § 23-15-1-1 which requires registration of a trade name.

We agree with BFI that a parent-subsidiary relationship consisting of mere investment holding by the parent would not be sufficient to bring it within Section 12 of the Clayton Act. See, *e.g., O.S.C. Corp.* v. *Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974). Similarly, limited interorganizational activities such as record reporting or monitoring activities would not suffice. See, *e.g., Fisher Banking Co.* v. *Continental Baking Corp.*, 238 F. Supp. 322 (D. Utah 1965). Nevertheless, this record establishes that there is enough control and direction from parent to subsidiary to make the parent amenable to suit in the Southern District of Indiana.

The leading case under Section 12 of the Clayton Act is *United States* v. *Scophony Corp.*, 333 U.S. 795. As the Court observed, Congress enacted Section 12 of the Clayton Act to enlarge the jurisdiction given by Section 7 of the Sherman Act (26 Stat. 210), which provided for suit in the district in which a corporate defendant "resides or is found." The Court construed the phrase "transacts business" in Section 12 of the Clayton Act as conveying "a much broader meaning for establishing venue than the concept of 'carrying on business' denoted by 'found' under [Section 7 of the Sherman Act] and [the] decisions [thereunder]." 333 U.S. at 804-807.

In *Scophony,* Justice Rutledge explained that in *Eastman Co.* v. *Southern Photo Company,* 373 U.S. 259, the Court had sloughed off highly technical distinctions glossed upon "found" in Section 7 of the Sherman Act and had substituted "the practical and broader business conception of engaging in any substantial business operations" (333 U.S. at 807). In *Eastman,* venue was held to have been established under Section 12 of the Clayton Act because Eastman was engaged " 'not only in selling and shipping its goods to dealers within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand of its goods through its demonstrators for the purpose of increasing its sales . . . .' " even though its business might be entirely interstate in character and transacted by agents not resident within the district (333

U.S. 808 n. 18). In language applicable here, the *Scophony* opinion described the *Eastman* decision as follows:

> "Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the 'found'-'present'-'carrying-on-business' sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstable' of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due." (Footnote omitted; 333 U.S. at 808)

As in *Scophony,* to say on this record that BFI did not transact business in the Southern District of Indiana during the period in question would be to disregard the practical, nontechnical business standard supplied by the phrase "transacts business" in the Clayton Act venue provision. 333 U.S. at 810. In our judgment, the facts shown of record are sufficient to support the venue in the Southern District of Indiana as to BFI. *Scophony Corp., supra* at 810-818; *Frank Oil Co.* v. *Continental Oil Co.*, 277 F.Supp. 357 (D. Colo. 1967); *Call Carl Inc.* v. *BP. Oil Corporation,* 391 F.Supp. 367 (D. Md. 1975); *Luria Steel and Trading Corp.* v. *Ogden Corp.*, 327 F.Supp. 1345 (E.D. Pa. 1971); *Grappone Inc.* v. *Subaru of America, Inc.*, 403 F.Supp. 123 (D. N.H. 1975). Although a judgment must be made in the total factual setting, *i.e.,* what the subsidiary does for itself and what the parent does for the subsidiary, once a sufficient level of control is established, the fact that the subsidiary is not controlled to an ultimate degree is irrelevant to the decision to pierce the corporate veil for venue purposes. Therefore, we will not discuss the countervailing facts relied upon by BFI.

Since 1969, BFI has pursued the goal of building a nationwide waste system company primarily through the means of acquiring existing businesses with a history of

successful operation in the waste systems industry. BFI's construction of Section 12 of the Clayton Act would enable large American corporations like itself to circumvent the antitrust laws by incorporating the many functional subparts of the parent into local operations. This would thwart the Congressional intent to liberalize the restrictive venue provision in Section 7 of the Sherman Act by enacting Section 12 of the Clayton Act. *Scophony Corp., supra,* 333 U.S. at 808-809 n.19. Because the revealed intercompany relations of BFI to BFI Indiana are sufficient to satisfy venue under the Clayton Act, it is unnecessary to consider whether the district court's April 27, 1976, orders staying plaintiff's venue discovery were proper.[3]

Monopolization of Interstate Commerce

In order for Section 2 of the Sherman Act to apply to BFI Indiana, it would have to be monopolizing, attempting to monopolize or combining or conspiring with another to monopolize "any part of the trade or commerce among the several States • • •." 15 U.S.C. § 2. Plaintiff submits that since it and BFI Indiana are competing in interstate commerce in the same market, the district court erroneously granted BFI Indiana's motion for summary judgment on the subject matter jurisdictional issue.

As to interstate commerce, the amended complaint alleges that the defendants, within the Southern District of Indiana, are engaged in and transact business in interstate commerce. The complaint also discloses that plaintiff also operates in interstate commerce. The relevant interstate product market described in the complaint is the Evansville, Indiana-Henderson, Kentucky, solid waste disposal market. Defendants are said to have attempted to monopolize that interstate market, so that plaintiff may be forced to discontinue its operations in that interstate marketplace. In view of such allegations, defendants' argument that plaintiff raised Tiger Trash's interstate activity for the first time on appeal must be rejected. The various other

[3] As will be seen, monopolization of interstate commerce has been sufficiently alleged. Consequently it is also unnecessary to consider whether the same orders staying plaintiff's interstate commerce discovery were proper.

pleadings, affidavits and Statement of Genuine Issues filed below also demonstrate that plaintiff has been complaining from the beginning about defendants' impact on competition with plaintiff in an interstate marketplace. Of course, at trial, defendants may be able to show that any restraints exerted by them did not affect "any part of • • • the trade or commerce among the several States" within the meaning of Section 2 of the Sherman Act. *Hospital Building Co.* v. *Rex Hospital Trustees,* 425 U.S. 738, 747 n. 5. Thus far, as we now demonstrate, they have not carried that burden.

Both plaintiff and BFI Indiana are engaged in the refuse business in Evansville, Indiana, and Henderson, Kentucky. The undisputed facts show that BFI Indiana has 20 customer accounts in Henderson, Kentucky, generating business amounting to 3-4% of the dollar volume obtained by it in Evansville, Indiana. Five per cent in number of BFI Indiana's accounts are located within Kentucky, and it advertises its services in the Henderson classified telephone directory. It maintains $6,000 worth of equipment (the total market value of all of BFI Indiana's equipment is $1,000,000) permanently in Kentucky and uses $100,000 worth of equipment there. Its Kentucky revenues amount to $30,000 per year. When BFI Indiana collects trash in Henderson, it deposits the trash in a landfill located in Kentucky rather than transporting it back to Indiana. Its Answer admits that it competes with plaintiff in the interstate marketplace of Henderson-Evansville. In 1975, plaintiff and BFI Indiana each had a 21% share of that market (D. Br. 10).

Two broad tests have developed to determine whether subject matter jurisdiction over a substantive Sherman Act claim exists. "[R]estraints on trade that are motivated by a desire to limit interstate commerce or that have their sole impact on interstate commerce" are enough to establish jurisdiction. *Hospital Building Co.* v. *Rex Hospital Trustees,* 425 U.S. 738, 743. This, the so-called "in commerce" test, looks to see if the relevant product market upon which the substantive claims have impinged is interstate in its geographic aspect. If the relevant product market is not itself interstate in its geographic aspect but a defendant's servicing of the market has incidental in-

terstate attributes, subject matter jurisdiction might still be found, but it cannot be under the "in commerce" test. In such a case, inquiry shifts to a determination whether "the restraint in question 'substantially and adversely affects interstate commerce'." *Hospital Building, supra,* at 743. This second condition is also sufficient to establish the interstate commerce nexus required for Sherman Act coverage.

In this case, plaintiff expressly relies solely on the "in commerce" jurisdictional test. Here $30,000 is generated in the interstate product market by defendant BFI Indiana. Whether or not the "in commerce" test, as we have defined it, can admit of an exception predicated on the existence of more than a *de minimis* amount of interstate commerce being involved need not be decided because $30,000 of interstate commerce would certainly be more than any required minimal amount. After *United States* v. *Southeastern Underwriters Ass'n,* 322 U.S. 533, 558, it has been clear that in enacting the Sherman Act Congress wished to push to the utmost its plenary constitutional power over interstate commerce and, ever since *Wickard* v. *Filburn,* 317 U.S. 111, the scope of this power has been known to be remarkably expansive. Subsequently, Justice Jackson, who authored *Wickard,* expressed the applicable principle in a nutshell in *United States* v. *Women's Sportswear Ass'n,* 336 U.S. 460, 464:

> "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

Nor does the small size of the interstate commerce upon which the anticompetitive restraints impinge defeat a Section 2 claim on the merits. Addressing itself to the question of monopolization under Section 2 of the Sherman Act, in *Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207, 213, the Supreme Court, through Justice Black, reminded us that the size of the victim ousted from the interstate product market, here Tiger Trash, is immaterial. As he stated:

> "As such it [the combination] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction

> makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." (Footnote omitted.)

As in *Klor's,* plaintiff might show that through its nationwide subsidiaries, BFI seeks to eliminate its competitors one by one throughout the United States.

Although the "substantial effect" test was not relied on by plaintiff, we note, in discharge of our affirmation duty to determine subject matter jurisdiction, that this test is also met. Just a year ago in *Hospital Building Co.* v. *Rex Hospital Trustees,* 425 U.S. 738, the Supreme Court renewed its disapproval of decisions dismissing Sherman Act complaints on the ground that they charge local restraint and monopoly. As explained there, it is unnecessary for an antitrust plaintiff to allege the defendant "had the purposeful goal of affecting interstate commerce" (425 U.S. at 745) or that "the conspiracy threaten[s] the demise of out-of-state businesses or that the conspiracy affect[s] market prices" (425 U.S. at 746). Plaintiff Tiger Trash may be able to prove that defendants' monopolization caused an effect on interstate commerce "that is more than merely inconsequential". *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F.2d 1286, 1303 (5th Cir. 1971), certiorari denied, 404 U.S. 1047. Since the relation of the alleged restraints to interstate commerce and their effect upon it are not "clearly nonexistent," summary judgment for BFI Indiana was inappropriate. *A. Cherney Disposal Co.* v. *Chicago & Suburban Refuse Disposal Ass'n,* 484 F.2d 751, 759 (7th Cir. 1973), certiorari denied, 414 U.S. 1131; *Rasmussen* v. *American Dairy Ass'n,* 472 F.2d 517 (9th Cir. 1973). Under this "concededly rigorous standard we conclude that the instant case is not one in which dismissal should have been granted." *Hospital Building, supra,* 425 U.S. at 746-747.

On this record, defendants have not persuaded as that a significant or appreciable segment of interstate commerce was not involved in this alleged attempt to monopolize. At this stage, plaintiff has adequately charged that a sufficient part of interstate commerce, namely the Evansville-Henderson market for refuse disposal, was affected. See

United States v. *Yellow Cab Co.*, 332 U.S. 218, 225; *United States v. Columbia Steel Co.*, 334 U.S. 495, 519. What the proofs will show is another matter, but at least plaintiff must be permitted to show (if it can) that an interstate market, the Henderson-Evansville area, was being monopolized by defendants. *Hospital Building, supra,* 425 U.S. at 747 n.5.

Because plaintiff's briefs do not question the dismissal of Indiana antitrust Count III, we do not address it here except to say that if the plaintiff wishes to press this pendent state claim, it is now free to do so. As a matter of judicial economy, the district judge should consider pendent Count III along with the two federal Counts. *Davis* v. *Murphy*. ..... F.2d ....., ... (7th Cir. 1977).

The amended complaint also contains Count IV brought against BFI under the anti-merger provisions of Section 7 of the Clayton Act (15 U.S.C. § 18). This count was not the subject of BFI Indiana's motion for summary judgment and has not been mentioned in the briefs or oral argument, possibly indicating that it has been dropped. If plaintiff intends to press Count IV, defendants will not be able to secure pretrial dismissal on commerce grounds, for BFI, the sole defendant in Count IV, is clearly "engaged in commerce," the two acquired corporations were allegedly engaged in interstate commerce, and "the effect of such acquisition may be substantially to lessen the competition, or to tend to create a monopoly * * * in any line of commerce in any section of the country" within the meaning of Section 7. *United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. 271; *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 194-195. Without foreclosing any defenses, we hold that Count IV at least states a claim under Section 7 of the Clayton Act.

Reversed and remanded with directions to permit discovery to proceed forthwith.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

TIGER TRASH, A Division of JOE W. MORGAN, INC. *Plaintiff,* vs. BROWNING-FERRIS INDUSTRIES, INC., BROWNING-FERRIS INDUSTRIES OF INDIANA, INC., *Defendants.*	No. EV 75-91-C

ORDER

This cause comes before the Court upon the motion of defendant Browning-Ferris Industries, Inc. to dimiss for lack of personal jurisdiction over such defendant, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, and upon the motion of defendant Browning-Ferris Industries of Indiana, Inc. for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Whereupon the Court having examined and considered the defendants' motions and the briefs, affidavits, and other documents in support thereof as well as the plaintiff's briefs, affidavits, and other documents in opposition thereto, and having heard oral argument on such motions, and being duly advised in the premises, the Court now finds that the defendants' motions should be GRANTED

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant Browning-Ferris Industries, Inc. is hereby DISMISSED from this action for lack of personal jurisdiction over such defendant and defendant Browning-Ferris Industries of Indiana, Inc. is entitled to SUMMARY JUDGMENT as a matter of law herein.

DATED this 12th day of October, 1976.

.....

JAMES E. NOLAND, *U.S. District Judge*

MEMORANDUM ENTRY

Plaintiff Tiger Trash, a division of Joe W. Morgan, Inc. (hereinafter plaintiff) has brought this action against defendants Browning-Ferris Industries, Inc., (hereinafter BFI) and Browning-Ferris Industries of Indiana, Inc., (hereinafter BFI-Ind.) under Section 2 of the Sherman Act, 15 U.S.C. § 2, and a similar provision of the Indiana Antitrust Act, *Ind. Ann. Stat.* § 24-1-2-2 (Burns Code Ed.). Subject matter jurisdiction of this Court is predicated upon 28 U.S.C. § 1337. Both the plaintiff and BFI-Ind., a wholly-owned subsidiary of BFI, are engaged in the business of providing refuse removal service for industry, commercial establishments, and apartments in the Evansville, Indiana and Henderson, Kentucky market area. The plaintiff alleges the defendants have committed various illegal acts in violation of applicable antitrust laws.

I. Motion to Dismiss Defendant BFI.

Defendant BFI has moved the Court to dismiss it as a defendant herein on the theory that it is not engaged in any business activity in the Southern District of Indiana which could serve as a basis for acquiring personal jurisdiction over such defendant under § 12 of the Clayton Act, 15 U.S.C. § 22, or under Trial Rule 4.4(A) of the Indiana Rules of Procedure. The plaintiff responds by arguing that BFI does transact business in this state through defendant BFI-Ind., and exercises sufficient control over such subsidiary to make it amenable to process in the courts of this state.

The Court has considered the extensive briefs filed by the parties on this issue and has examined the accompanying affidavits and other documents in support of each party's respective position. For the reasons stated below the Court believes that based on the undisputed facts defendant BFI does not transact business in this district under § 12 of the Clayton Act or engage in any act which would serve as a basis for personal jurisdiction under the Indiana Long-Arm Statute, TR. 4.4(A) of the Indiana Rules of Procedure.

The undisputed facts as gleaned from the affidavits and other documents filed herein are that BFI is a Delaware

corporation with its principal office and place of business in Houston, Texas. BFI is a non-operating parent company of several wholly-owned subsidiaries which engage in the waste removal business in various states. One of such subsidiaries is defendant BFI-Ind., which operates in the Evansville, Indiana and Henderson, Kentucky area. BFI itself is not authorized to do business in Indiana and it owns no property in this state. BFI does not employ anyone residing in this state and operates no facility or office of any kind in Indiana. As a non-operating parent company, BFI does not itself engage in the refuse removal business in this or any other state. There does, however, appear to be more than a casual relationship between BFI and BFI-Ind. Certain of the officers of BFI-Ind. are also officers of BFI. Consolidated financial statements and tax returns are filed by BFI and its subsidiaries. The parent initiates management training and development programs for its subsidiaries, although BFI-Ind. asserts that it does not utilize the program. Division Regional officers of BFI assist in the activities of the subsidiaries in their respective local regions. National marketing programs are carried on by BFI to enhance the promotional efforts of their local operations. To this end, it appears that neither BFI nor BFI-Ind. make a determined effort to notify the public that they are separate entities. That is to say, both BFI and BFI-Ind., conduct their advertising and promotional activities in such a manner so as to give the appearance of one company operating nationwide to provide waste removal services. Also, additional services, such as the lending of money for capital improvements, are also provided by BFI to its subsidiaries.

The issue before the Court is whether BFI "transacts business" within the Southern District of Indiana so to make it amenable to suit here under 15 U.S.C. § 22. The Supreme Court has held this to mean that a corporation is engaged in transacting business in a district ". . . if, in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." *Eastern Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 373 (1929). Various cases have held that the transacting of business in the district by a subsidiary does not in and of itself constitute the transacting of business by the parent corpora-

tion in the district, within the meaning of 15 U.S.C. § 22. See *O.S.C. Corporation v. Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974); *Phillip Gall & Son v. Garcia Corp.*, 340 F. Supp. 1255 (E.D. Ky. 1972). This principle applies even if the subsidiary is wholly-owned by its parent. *Zwingle v. Tyson's Food, Inc.*, 241 F.Supp. 940 (W.D. Okl. 1965).

The crucial issue is whether or not the parent *controls* the day-to-day operations of its subsidiary. *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358 (10th Cir. 1974); *San Antonio Telephone Co., Inc. v. American Telephone & Telegraph Co.*, 499 F.2d 349 (5th Cir. 1974); *O.S.C. Corporation v. Toshiba America, Inc., supra*, 491 F.2d at 1066; *In Re Chicken Antitrust Litigation*, 407 F.Supp. 1285 (N.D. Ga. 1975); *Grappone, Inc. v. Subaru of America, Inc.*, 403 F. Supp. 123, 130-31 (D.N.H. 1975); *Carl Call, Inc. v. BP Oil Corporation*, 391 F.Supp. 367 (D. Md. 1975). The parent must not only have the opportunity to control, it must actually and consciously exercise such control. *Quarles v. Fuqua Industries, Inc., supra*, 504 F.2d at 1364; *Carl Call, Inc. v. BP Oil Corporation, supra*, 391 F.Supp. at 374. The control must be such that the parent and subsidiary act almost as a single business entity. *San Antonio Telephone Co. Inc. v. American Telephone & Telegraph Co., supra*, 499 F.2d at 352.

There are many reported decisions wherein the courts have attempted to apply the above principles to the particular facts of each case. In light of the undisputed facts of this case as borne out by the affidavits and supporting documents tendered by the parties, this Court believes that BFI does not in fact control the day-to-day business operations of BFI-Ind. Although it apparently has the potential to play a significant role in major decisions affecting its subsidiary, this alone is not sufficient to bring it within the jurisdiction of this Court. The record reveals herein that BFI-Ind. determines the type of waste removal service it will offer in this area without the approval of BFI and the subsidiary makes all decisions concerning the geographical area in which service will be provided. BFI-Ind. also establishes its own pricing schedule independently of BFI. With regard to local advertising, the subsidiary

engages in its own promotional efforts. Although the subsidiary and parent seem to emphasize their affiliation and BFI aids in local promotion through the use of national programs, other courts have held that "national advertising which finds it way into a particular jurisdiction is insufficient to support a finding of transaction of business." *San Antonio Telephone Co., Inc. v. American Telephone & Telegraph Co., supra*, 499 F.2d at 351-52 n. 5. See also *Grappone, Inc. v. Subaru of America, Inc., supra*, 403 F. Supp. at 130. All employees of BFI-Ind. are paid by the subsidiary and none of such employees are employed by BFI. The individual responsible for managing BFI-Ind. is neither a director officer, nor employee of BFI. Furthermore, BFI-Ind. owns all of its assets, including land, building, and equipment, and none of such assets are provided by or leased from BFI. All purchases and sales of equipment are made by the subsidiary and although BFI makes funds available to BFI-Ind. for necessary expenditures, such loans are repaid by the subsidiary with interest. Capital improvements are planned and paid for by the subsidiary. BFI-Ind. has its own separate corporate identity as to the operation of its cash flow and the payment of its obligations while the parent has no bank account or other office in this jurisdiction. BFI-Ind. is also completely in charge of its employee recruiting without help from BFI.

The above recited facts describing the relationship between BFI and BFI-Ind. make it clear that BFI-Ind. is not the agent or *alter ego* of BFI. While some degree of control inherently results from the nature of the corporate structures, the Court believes that the two corporations function separately from each other and must be treated as such in this lawsuit. See *In Re Chicken Antitrust Litigation, supra*, 407 F.Supp. at 1293.

In the case of *Carl Call, Inc. v. BP Oil Corporation, supra*, it was noted that the test of venue under the Clayton Act turns on the facts of each case and generalizations are for the most part impossible. The Court went on to state:

> "Notwithstanding the fact that the parent may own all of a subsidiary's stock, and interlocking directorships may exist between the two corporations, it

> is axiomatic that if a subsidiary maintains its own books and accounts, and makes its own marketing, purchasing, management, and other policy decisions, it cannot be held to be acting as an agent of the parent.
>
> * * * *
>
> "The key factor . . . in determining venue is the ability of the parent to influence major decisions of the subsidiary which lead or could lead to violations of the antitrust laws." 391 F.Supp. at 371.

Under the facts as appear in this case, BFI does not in any way control the day-to-day business operations of BFI-Ind. and there has been no showing that BFI in any way controls or affects the subject matter of this antitrust action, i.e., the pricing policies of BFI-Ind.

Therefore, personal jurisdiction over BFI and venue in this Court cannot be predicated herein under 15 U.S.C. § 22. The Court does not believe further discovery is necessary in order to resolve the crucial issue of whether BFI controls the daily operations of BFI-Ind., since there has already been substantial discovery in this area and the facts relevant to this inquiry do not appear to be in dispute.

As to the plaintiff's attempt to acquire jurisdiction over BFI by means of the Indiana Long-Arm Statute, T.R. 4.4(A) of the Indiana Rules of Procedure, the Court also does not believe this defendant has submitted to the jurisdiction of the courts of this state by doing one of the acts enumerated under such statute which serve as the basis for acquiring jurisdiction over non-resident defendants. The above analysis reveals that BFI does not conduct any business in this district and there is sufficient corporate independence between the parent and its subsidiary to believe that BFI-Ind. is not merely acting as the agent of BFI. Therefore, jurisdiction over BFI cannot be predicated under Trial Rule 4.4(A)(1).

Additionally, since the plaintiff cannot acquire jurisdiction over BFI under 15 U.S.C. § 22, the state long-arm rules are to be used only for determining the existence of jurisdiction over the foreign parent corporation *on the state law counts*. See *Carl Call, Inc. v. BP Oil Corporation, supra,*

391 F.Supp. at 376-77. In light of the above decision that defendant BFI is not within the jurisdictional reach of this Court under federal law and the decision set forth hereinafter that defendant BFI-Ind. is entitled to summary judgment on the federal law claims, the Court does not believe that it should accept pendent jurisdiction over the related state law claims brought herein. Even assuming the plaintiff could acquire jurisdiction over BFI under Trial Rule 4.4, since the federal law claims have been disposed of it would not be proper for this Court to litigate claims against the defendants which are based entirely on state law. As a result, the Court would refuse to exercise pendent jurisdiction over defendant BFI under the applicable provisions of Trial Rule 4.4 and the state antitrust statutes.

II. Defendant BFI-Ind.'s Motion for Summary Judgment.

Defendant BFI-Ind. has moved this Court for summary judgment on the plaintiff's complaint herein alleging two grounds in support thereof. Initially BFI-Ind. asserts that as a matter of law under Section 2 of the Sherman Act, 15 U.S.C. § 2, there is no dangerous probability that BFI-Ind. can obtain monopoly power in the Evansville/Henderson market area. In support of such motion, the defendant has the affidavit of Harold Post, Vice President of BFI-Ind., who provided the Court with explanatory information such as the firms presently engaged in refuse collection in the market area, the extent of BFI-Ind.'s share of such business, the type of collection equipment utilized by BFI-Ind. and the other firms, etc. The gist of the defendant's argument is that there are at least ten firms engaged in the refuse collection business in the market area, that none have a superior market position, and that BFI-Ind.'s share of the market has decreased since the plaintiff entered business in this market. In light of such situation as described by the defendant, the Court is asked to rule as a matter of law that even if the defendant has engaged in unlawful monopolistic practices, there is no dangerous probability of the defendant's acquiring a monopolistic status. The defendant has cited to the Court various antitrust cases wherein courts have entered summary judgment for the defendant on such a theory. See *e.g. Cal Distributing Co. v. Bay Distributors, Inc.,* 337 F.Supp. 1154 (M.D.

Fla. 1971); *V. & L. Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F. Supp. 643 (E.D. Pa. 1975); *Varney v. Coleman*, 385 F. Supp. 1337 (D.N.H. 1974).

The plaintiff has countered such motion with the affidavit of John S. MacLeod, Executive Vice President and General Manager of the plaintiff, and supporting brief which disputes many of the defendant's allegations and argues that it is possible for the defendant to acquire monopolistic influence in this market. The plaintiff asserts that further discovery would make it clear that the defendant has more significant control in the market than the defendant would lead the Court to believe by its motion for summary judgment.

The Court believes it is not possible at this time to find as a matter of law that BFI-Ind. does not have the potential to acquire monopolistic control in this market. The plaintiff's affidavit and brief raise too many unanswered questions of fact for the Court to make such a determination under the present status of this case.

However, defendant BFI-Ind. has also moved this Court for summary judgment on the theory that Section 2 of the Sherman Act is inapplicable herein because the defendant's activities do not have an appreciable effect on interstate commerce. For the reasons hereinbelow stated, the Court does not believe further discovery is necessary to clarify facts relevant to this issue and finds that the defendant's motion for summary judgment may be granted.

The law is well settled that in order to invoke the provisions of the Sherman Act, the plaintiff must show that the defendant's alleged violations had an impact which *substantially* affected interstate commerce. *Lieberthal v. North County Lanes, Inc.*, 332 F.2d 269 (2nd Cir. 1964). The Court of Appeals for this circuit has similarly held that the acts must have an *appreciable* effect on interstate commerce. *Best Advertising Corp. v. Illinois Bell Telephone Co.*, 339 F.2d 1009 (7th Cir. 1965). Businesses which are essentially local in nature, such as refuse collection in the Evansville area, are not transferred into interstate business subject to the Sherman Act merely because the business has some incidental contacts with another state.

It is undisputed in this case the City of Henderson, Kentucky operates its own sanitary landfill and provides its own residential trash collection as well as container trash service to certain commercial accounts. However, a few Evansville firms, including BFI-Ind. engage in business in Henderson. The facts indicate, however, that BFI-Ind.'s contacts with Henderson are minimal. Even accepting as true the plaintiff's estimate that the defendant has $6,000 worth of refuse containers permanently located in Henderson, such amount would still constitute less than one percent (1%) of the total equipment which the plaintiff estimates is used by BFI-Ind. Similarly it appears that the defendant's estimated annual revenue of $30,000 from the Henderson area is only 3-4% of BFI-Ind.'s Evansville volume. The plaintiff also attempts to predicate jurisdiction on the fact that the defendant is the only Evansville trash collection firm advertising in the "Yellow Pages" of the Henderson telephone directory. Such fact is not persuasive herein in the absence of any evidence that the defendant is significantly engaged in a business operation which affects commerce in more than one state.

In the recent case of *J. P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc.*, an unreported case out of the Eastern District of Pennsylvania, Cause Number Civ. 75-1201 (March 31, 1976), the Court was faced with a situation similar to the one herein where a plaintiff attempted to state a claim under the Sherman Act by reason of the defendant's trash hauling business which operated across state lines. The facts showed, however, that less than two percent (2%) of the defendant's gross income was derived from business outside of Pennsylvania. The Court granted the defendant's motion for summary judgment stating:

> "The pivotal issue involved is whether or not the defendants' business activities constituted interstate commerce. We have concluded that the business of the defendants was a purely local operation, occurred wholly on the state or local level and did not substantially affect interstate commerce."

Other cases which have held that a *de minimus* amount of interstate business is not sufficient to transform an essentially intrastate business into an interstate business include

Yellow Cab Co. of Nevada v. Cab Employers, Automotive & Warehousemen, Local #881, 457 F.2d 1032 (9th Cir. 1972); *Kallen v. Nexus Corp.,* 353 F. Supp. 33 (N.D. Ill. 1973).

Furthermore, the plaintiff's attempt to support its claim of interstate commerce upon the activities of the parent, BFI, in the various states is precluded by this Court's finding that BFI and BFI-Ind. are independent entities and the clear line of authority recognizing that "the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." *Page v. Work,* 290 F.2d 323, 330 (9th Cir.) *cert. denied,* 368 U.S. 875 (1961); see also *Lieberthal v. North Country Lanes, Inc., supra,* 332 F.2d at 272.

The Court believes the undisputed facts herein demonstrate that the defendant is primarily engaged in the refuse collection business in Evansville, Indiana, and any contact with the State of Kentucky is merely incidental to its Indiana operations. Therefore, the plaintiff cannot bring an action under Section 2 of the Sherman Act against defendant BFI-Ind. and such defendant's motion for summary judgment should be GRANTED.

As to the plaintiff's claims against the defendants based upon the state antitrust laws, the Court believes in light of its dismissal of the federal law claims herein that it should refuse to accept pendent jurisdiction over such state law claims. See *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966); *Abiodun v. Martin Oil Service, Inc.,* 475 F.2d 142 (7th Cir. 1973), *cert. denied,* 416 U.S. 866 (1973); *Whitfield v. Illinois Board of Law Examiners,* 504 F.2d 474 (7th Cir. 1974). Therefore, the plaintiff's claims based on state law are hereby DISMISSED.

Findings of fact and conclusions of law have not been specifically set forth but are incorporated into the body of the foregoing Memorandum Entry as authorized by Rule 52 of the Federal Rules of Civil Procedure.